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Supreme Court of the United States

October Term, 1935

Nos. ~~893 and 894~~

WILLIAM FOX,
Petitioner,

against

CAPITAL COMPANY, a California corporation.

BRIEF IN OPPOSITION TO MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI AND IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

FREDERICK H. WOOD,
WILLIAM D. WHITNEY,
SAMUEL B. STEWART, JR.,
Counsel for Respondent.

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Questions Presented

The motion and petition present two questions:

(1) On the merits: Whether a judgment debtor sought to be examined as to his assets by a judgment creditor in the effort to collect a judgment, is not a "witness" within the meaning of the statute (28 U. S. C. § 654) which provides that "subpoenas for witnesses" may be served within one hundred miles from the court house;

(2) As to the appealability of a contempt order in supplementary proceedings prior to termination of the supplementary proceedings: Whether, where a fine for contempt is imposed in two parts, one for the amount of the judg-

ment, and the other for costs in seeking to enforce the judgment, and a provision is made that the contempt may be purged in respect of the first, but that the second must be paid by the judgment debtor in any event, there is a final order appealable as of right.

Statement

Respondent holds a judgment in the amount of $297,412.91 against William Fox, entered in the United States District Court for the Southern District of New York, on July 18, 1935 (R. 7). William Fox has been evading payment of the judgment. Respondent's attorneys have been engaged in extensive and diligent efforts to locate and serve petitioner, who has been obviously evading service (R. 36-40; 7-11)[1]. Service was effected on petitioner at the railroad station at Frankford Junction, Pennsylvania, concededly within one hundred miles of the court house (R. 2-3; 7). Upon petitioner's defiance of the subpoena, the District Court entered two orders, the first adjudging petitioner in contempt, and the second directing him to pay (1) $235,082.03, representing the unpaid balance due upon the judgment and interest, and (2) $10,000 as costs in supplementary proceedings, representing fees and disbursements of respondent's attorneys in the efforts to locate and serve petitioner (R. 27-30; 54-56). As to the $235,082.03, the order permitted the petitioner to purge himself of the contempt by appearing and testifying (R. 56). Appeals from both orders were dismissed by the Circuit Court of Appeals for the Second Circuit (R. 80; 95).

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[1]Indeed, service was once before effected on petitioner (at Atlantic City), but was set aside on the ground that Atlantic City was more than 100 miles from the court house (R. 38).

ARGUMENT

POINT I

THE SUBPOENA DEFIED BY THIS JUDGMENT DEBTOR WAS DULY AND PROPERLY SERVED.

The first question,—whether the statute applies,—appears to us to be answered by the plain language of the statute itself (28 U. S. C. § 654):

> "* * * subpoenas for witnesses who are required to attend a court of the United States, in any district, may run into another district; *provided* That in civil cases the witnesses living out of the district in which the court is held do not live at a greater distance than one hundred miles from the place of holding the same."

This statute has been expressly held to apply to subpoenas issued in supplementary proceedings in the Federal Courts of New York State. *Meyer* v. *Consolidated Ice Co.*, 163 Fed. 400 (E. D. N. Y., 1908). The case cited is a direct authority for this point, and has been followed without question by the bar for 28 years. The Court said in part, at p. 404:

> "* * * inasmuch as the subpoenas of the United States courts are especially given authority *within a radius of 100 miles*, in civil cases, it does not seem that this court should limit the right of subpoena in a particular kind of case, because of similarity of legislation in the State of New York, when the New York statute is not expressly applicable." [Italics ours]

For the purposes of the statute, a witness has been deemed to live where he is found and served.[2] *Mut. Ben. Life Ins. Co.* v. *Robison,* 58 Fed. 723, 732 (C. C. A. 8th 1893); *Seiden* v. *Concordia Fire Ins. Co. of Milwaukee,* 49 Fed. (2nd) 474 (S. D. N. Y. 1931). Of course, in the present case it makes little difference whether the word "live" means place of temporary sojourn or place of permanent domicile, for this judgment debtor has always been domiciled in New York, having a place of residence in the Borough of Manhattan, City of New York, which is in the Southern District of New York, and another place of residence in the County of Nassau in the Eastern District of New York (R. 9).

The suggestion that the word "witness" in the statute applies against a third party witness in supplementary proceedings, but does not apply against the judgment debtor himself when required to testify as to his property, is obviously unsound.

In New York State, judgment debtors are required to testify[3] pursuant to "subpoena", by the express terms of Section 774 of the Civil Practice Act, which provides that supplementary proceedings may be instituted on the part of a judgment creditor,

> "(1) By order of the court.
>
> "(2) By subpoena of the judgment creditor's attorney, served upon the judgment debtor, a third party or a witness.

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[2]Petitioner does not argue to the contrary.

[3]It would seem that the very definition of "witness" would be "one who is required to testify." *Bouvier's* Law Dictionary (ed. 1914) explains that the word "witness" derives from the Anglo-Saxon *witan* ("to know"), and citing Greenleaf on *Evidence,* gives the simple definition, "One who testifies to what he knows".

"(3) By warrant issued as in this article provided."

This proceeding was instituted by the second method (R. 1-3).

Whether the supplementary proceeding is, as its name implies, incidental and supplementary to the main proceeding, or is an entirely independent proceeding (as petitioner argues), need not be considered. It is in any event a proceeding instituted by subpoena, and the United States statute provides the territorial limits of the United States District Court's jurisdiction in respect of the service of the subpoena.

POINT II

THE AWARD OF COSTS DID NOT MAKE THE CONTEMPT ORDER OF THE DISTRICT COURT FINAL OR APPEALABLE. DISMISSAL BY THE CIRCUIT COURT OF APPEALS WAS THEREFORE PROPER.

The suggestion that that part of the fine which represents fees and disbursements of respondent's attorneys, awarded to them as costs in the supplementary proceedings, constitutes a final order, appealable as of right, is expressly negatived by *Doyle* v. *London Guarantee & Accident Company, Limited*, 204 U. S. 599 (1907). The defendants were there directed to produce their books and papers by a certain date, or pay a fine of $250 "and also the costs accruing upon this motion, including the stenographer's charges". The petitioner states (Br. p. 20) "that leave to purge was given". This is true of the fine (as in our case), but is untrue as to the costs, for the order expressly provided that:

> "if they produce the cash book alone, they are ordered to pay *no more than* the costs accruing upon this motion, including the stenographer's charges * * *" (204 U. S. at p. 602; Italics ours).

The *Doyle* case was, therefore, in all material respects, like the case at bar.

The petitioner concedes (Br. p. 20) that the supplementary proceedings, in which this contempt order was entered, have not been terminated. Section 802 of the New York Civil Practice Act provides that a supplementary proceeding

> "shall continue until closed or discontinued by consent or discontinued, dismissed or closed by order of the court; but a proceeding shall be deemed closed two years from the service of the order, subpoena or warrant whereby the proceeding is instituted unless the court shall make an order extending the time for a definite period."

In the absence of consent it is obviously contemplated that some "final order" of the court shall be entered, after which any questions raised in supplementary proceedings would be reviewable in the Circuit Court of Appeals. Moreover, if petitioner be committed to custody pursuant to a contempt order not otherwise reviewable, review of the question whether the Court had jurisdiction to make the order will always be open by way of application for a writ of habeas corpus. *Ex Parte Fiske*, 113 U. S. 713.

It is only too clear that the reason for this judgment debtor's very strenuous efforts to raise technical objections in an appeal now, before a "final order" has been entered terminating the supplementary proceedings, is that if he waits he may in the meantime have to pay the judgment

(which he confessed, and from which no appeal has been taken) or to submit, like any other judgment debtor, to an examination respecting his assets. Such reasons, we submit, do not justify the grant of this prerogative writ.

Respectfully submitted,

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